

IN THE
Supreme Court of the
United States

CLAUDE SMITH
Petitioner

vs.

THE STATE OF GEORGIA
Respondent

PETITION FOR CERTIORARI
FROM COURT OF APPEALS OF GEORGIA

SUMMARY AND STATEMENT OF MATTER
INVOLVED

Petitioner was charged by indictment in the Superior Court of Fulton County with the offense of keeping, maintaining and operating a lottery; a misdemeanor. This indictment was transferred to the Criminal Court for trial, and upon the call of the case and before pleading thereto, petitioner filed a motion to recuse the trial judge on the following ground:

MOTION TO DISQUALIFY AND RECUSE

"Now comes the defendant in the above entitled case and before arraignment and pleading thereto, makes and files this his objection to the Honorable Jesse M. Wood, presiding in said case and for grounds of same says as follows:

1. That it will be impossible to secure a fair trial before said Judge because of interest, prejudice and bias as will hereinafter more fully appear.

2. That if this defendant is tried before said judge presiding, the said trial will be coram non judice in that defendant will be denied due process of law and equal protection under the 14th Amendment of the Constitution of the United States by reason of the fact that petitioner will not be afforded a legal trial before a fair, impartial and unbiased presiding judge.

3. Defendant shows that said Judge has *heretofore* on the 26th day of March, 1945, released from serving a sentence on the chaingang of Georgia one Eddie Lee Seals on the grounds that this indictment against this defendant having been procured on the testimony of said Eddie Lee Seals, and said Eddie Lee Seals had expressed a willingness to testify against this defendant on the trial of this case.

4. Defendant shows that by reason of said order, certified copy of which is attached and made a part hereof, said Judge disclosed his interest, prejudice and bias against this defendant in that by said order releasing said Eddie Lee Seals from the sentence heretofore imposed

on him in consideration of his testifying both before the Grand Jury and against this defendant in the trial of this case before the said Judge, all of which will deny to this defendant due process of law under the 14th Amendment to the Constitution of the United States.

5. Defendant alleges that the Honorable Jesse M. Wood has thus stepped aside from his judicial duties as a fair and impartial judge, and become a prosecutor against this defendant in this case.

6. Defendant alleges that the witness, Eddie Lee Seals is thus under coercion and duress, in that as said order provides the sentence is suspended at the discretion of the Court and until further order of the Court.

7. Defendant alleges that the threat and implication is thus plain that in the event the witness does not testify against this defendant, the court will or may revoke the suspension and place said witness back in the chaingang of Georgia.

Wherefore, defendant prays that the Court recuse himself in the trial against this defendant.

W. R. BENTLEY

GEO. G. FINCH

Attorneys for Defendant

STATE No. 188774
vs. CRIMINAL COURT OF FULTON COUNTY
EDDIE LEE SEALS SENTENCE OF TWELVE MONTHSS

It appearing to the Court that the above named defendant did, at the March-April Term, 1945, of the Superior Court of Fulton County, appear as a witness before the Grand Jury in the case of the State vs. Claude Smith, and that upon defendant's evidence an indictment was returned against said Claude Smith.

And it further appearing to the Court that upon said indictment being returned and transferred to the Criminal Court of Fulton County, defendant herein not only testified before the Grand Jury, but showed a willingness also to testify for the State in said case.

And it further appearing to the Court that it is to the best interest of society and in line with the public policy of the State to extend immunity to witnesses who turn State's evidence.

It is therefore, considered, ordered and adjudged that the remainder of the sentence originally imposed in the case of the State vs. Eddie Lee Seals be, and the same is hereby suspended at the discretion of the Court until further order of the Court.

And it is further ordered that A. B. Foster, Sheriff, release said prisoner, this the 26th day of March, 1945.

JESSE M. WOOD, *Judge*,
Criminal Court of Fulton County.

STATE OF GEORGIA
COUNTY OF FULTON

I, Lee Earl Largen, Deputy Clerk of the Superior Court of Fulton County, Georgia, do hereby certify that the within and foregoing is a true and correct copy of Order of Court in case No. 188774, Criminal Court of Fulton County, State vs. Eddie Lee Seals, all of which appears on file and record in the Criminal Court of Fulton County, Georgia.

Given under my hand and seal of office, this the 5th day of April, 1945.

LEE EARL LARGEN, *Deputy Clerk*,
Superior Court, Fulton County Georgia.

A. That under the Act of the Legislature of 1891, page 936, there is provided by law twelve terms per year, being designated by the name of the month, for the Criminal Court of Fulton County.

B. That under the laws of Georgia, as shown by Act of 1943, page 218, authority to grant pardons and paroles is vested in the Prison Board of Georgia.

C. That the Hon. Jesse M. Wood, Judge of the Criminal Court of Fulton County is not a member of said Board.

D. That under the laws of Georgia as set forth by the Supreme Court of Georgia in the case of Porter, etc., Garmony, etc., 148 Georgia, 261, a trial Judge has no authority after the term in which a sentence was passed to change or modify the same.

E. Petitioner shows that under the Acts of the Legislature of 1841, page 61, Section 33, it is provided "there shall be no jury trial unless demanded by the accused." Petitioner shows that at the time the foregoing motion to disqualify the Hon. Jesse M. Wood was filed and passed upon there had been no demand for a jury trial and the said judge was sitting in a dual capacity as judge and jury.

F. That the Board of Pardons and Parole of the State of Georgia has and does refuse to release inmates of the chaingang solely in consideration of their having testified for the prosecution in a lottery case as shown in letter herein set forth.

December 6th, 1944.

"Hon. E. E. Andrews:
Assistant Solicitor General,
Atlanta Judicial Circuit,
Atlanta, Georgia.

Re: Billy Stokes
Jim Porter
Grady Brown
Hazel Neely Jones

Dear Mr. Andrews:

The Board wishes to acknowledge and thank you for your letter of December 4th, written in behalf of the above-named prisoners. The members greatly appreciate you expressing your reasons why you recommend the release of these parties. We want you to know that the Board is in sympathy with you, the Solicitor of the City

Court and all others in the undertaking to "wipe out" the lottery racket and imprison the "higher ups" whom you say control and operate the lottery business in this section. Notice that the above-named prisoners have testified for the State in a recent lottery conviction is very encouraging and this information is being placed in the file of each of the prisoners mentioned above.

We wish to assure you and Mr. Camp that this information will be very valuable to the Board in passing on these cases when the parties become eligible for parole consideration. The Board, based on its own investigation, will be very happy to release these people, if, in our discretion, we feel that they are suitable and safe parties to return to their communities.

The Board wishes to go on record as saying that testimony in behalf of the State will be one Item in their favor in considering the cases for parole. On the other hand, we wish you to know as well as Solicitor Camp and other interested parties, that turning State's evidence is not of itself sufficient to justify this Board to grant parole when we do not feel, from their past record, that they are suitable parties to release to society.

Assuring you of our full cooperation, I am

Very truly yours,

EDWARD B. EVERETT, *Chairman*

The motion to disqualify the trial Judge was overruled and denied. Thereafter and within the time prescribed by law, a certiorari from the Criminal Court of Fulton

County to the Superior Court of Fulton County was obtained, which was thereafter overruled and dismissed by the presiding Judge in the Superior Court. Thereafter and within the time prescribed by law, a Bill of Exceptions was filed carrying said case to the Court of Appeals of Georgia, which court affirmed the ruling of the lower court. Thereafter and within the time prescribed by law, an application was made to the Supreme Court of Georgia to review this Court of Appeals decision. This application was denied by a five to two vote of the Justices of the Supreme Court of Georgia.

Petition to the Supreme Court of the United States for certiorari to the Court of Appeals of Georgia is now applied for.

STATEMENT OF BASIS OF JURISDICTION

Petitioner states that this Court has jurisdiction to review the decision complained of by reason of authority granted in U.S.C.A. Title No. 28, sec. 344 par. (b).

"It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by appeal, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had * * * where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution * * *

Petitioner shows that he has been denied due process of law under the 14th Amendment to the Constitution of the United States in that he has been denied a fair and impartial trial before an impartial judge. The trial Judge in this case having "paid a convicted person" to testify against petitioner on his trial before the trial Judge. Said payment consisting of an order by the trial Judge prior to the trial of this defendant illegally and unlawfully releasing the convicted witness from a prison sentence in consideration of his agreement to testify against petitioner

Petitioner shows that the Supreme Court of Georgia on the 16th day of May, 1947, denied a certiorari from the Court of Appeals of Georgia to the Supreme Court of Georgia, and the date of the judgment sought to be reviewed is therefore May 16, 1947.

Petitioner shows that the Supreme Court of the United States has jurisdiction of this petition for certiorari because petitioner has been denied due process of law and equal protection by having been compelled to stand trial before an interested, prejudiced and biased Judge who had "bought and paid a witness" to testify against petitioner, which constitutes a violation of the 14th Amendment to the Constitution of the United States as follows:

"* * * Nor shall any person be deprived of life, liberty, or property without due process of law."

Petitioner asserts this clause of the Constitution as the basis for this Court's jurisdiction because petitioner has been convicted by the State of Georgia in a court in which there was no legally qualified presiding judge, and the trial was coram non iudice.

GROUND'S UPON WHICH QUESTIONS INVOLVED ARE SUBSTNTIAL

The question involved in this petition for certiorari is substantial and of gravity and importance in that the Constitutional rights of a citizen is involved. The Judge, in the event of a conviction of a misdeamonr, as in this case, fixes the punishment of the defendant, and in stepping aside from his judicial' role of a fair and impartial judge, to that of a prosecutor against petitioner by releasing illegally a convicted witness from the chaingang of Georgia in consideration of this convicted witness' willingness to testify against petitioner before the said trial Judge, denied petitioner due process of law by being compelled to stand trial before such a Judge. The question involved in this petition for certiorari is based solely upon the denial of due process of law in violation of the 14th Amendment to the Constitution of the United States.

MANNER OF RAISING CONSTITUTIONAL QUESTION

Petitioner shows that the question involved in this petition for certiorari was raised in the trial court to-wit: On the call of the case for trial in the Criminal Court of Fulton County and before arraignment and pleading thereto, petitioner filed a motion to recuse the trial Judge because of interest, prejudice and bias (Rec. p. -----). Thereafter this motion was overruled, notwithstanding there were twelve other Judges in Fulton County qualified to try said case and all of whom were then in the Fulton County Courthouse. The motion to recuse

the trial Judge was overruled by the court (Rec p. -----). The question was then raised in the Superior Court of Fulton County, Georgia, on a certiorari to the Criminal Court of Fulton County (Rec. p. -----). The Superior Court of Fulton County overruled petitioner's certiorari on the 3rd day of April, 1946 (Rec. p. -----). The Court of Appeals of Georgia affirmed the decision of the Superior Court on the 23rd day of January, 1947 (Rec. p. -----). Thereafter the Court of Appeals of Georgia, on the 20th day of February, 1947, denied petitioner's motion for a rehearing (Rec. p. -----). Thereafter and within the time prescribed by law, the question was presented by petitioner on application to the Superior Court of Georgia for a certiorari to the Court of Appeals of Georgia (Rec. p. -----). Thereafter and on the 19th day of April, 1947, the Supreme Court of Georgia by a five to two decision denied petitioner's application for a certiorari to the Court of Appeals of Georgia (Rec. p. -----).

Thereafter on the 16th day of May, 1947, the Supreme Court of Georgia denied petitioner's application for a reconsideration of said application for certiorari (Rec. p. -----).

THE QUESTION PRESENTED

Petitioner shows to the Court that the question presented herein is:

"Does a State deny due process of law to a defendant in violation of the 14th Amendment to the Constitution of the United States when a defendant is compelled to stand trial before a trial Judge who had paid a witness to testify against petitioner in the case in which said trial

Judge presided? In other words, does a trial Judge deny to a defendant due process of law and equal protection when such trial Judge steps aside from his judicial duties as a fair and impartial trial Judge by illegally and unlawfully releasing a convicted witness from further penal servitude upon such convicted witness agreeing to testify against petitioner in a criminal case to be tried before said trial Judge and wherein the sentence in the event of conviction is fixed by such prejudiced and biased Judge?"

REASONS RELIED ON FOR ALLOWANCE OF WRIT OF CERTIORARI

Petitioner relies upon the following reasons for the issuance of the writ of certiorari by this court to review the decision of the Court of Appeals of Georgia:

1. The decision of the Court of Appeals of Georgia is in direct conflict with the Constitution of the United States and the 14th Amendment which provides that no State shall deny due process of law or equal protection, whereas in the instant case the defendant was denied due process of law and equal protection in that in violation of State Constitution and also defendant was forced to stand trial on a criminal indictment before a trial Judge who had procured testimony of a witness or witnesses by releasing them from penal servitude solely in consideration of such witness's agreeing to testify against petitioner in the said trial Judge's court.

2. The Supreme Court of Georgia did not unanimously uphold the Court of Appeals in denying the

petition for certiorari. Associate Justice William Atkinson, a former prosecuting attorney, and Associate Justice T. Grady Head, former Attorney General of Georgia, dissented from the order denying the certiorari.

Wherefore, petitioner prays that the writ of certiorari to the Court of Appeals of Georgia be granted and that the judgment of the Court of Appeals of Georgia be reversed.

Geo. G. Zinn

G. Seals Aiken

Attorneys for Petitioner in Certiorari.

SUPREME COURT OF THE UNITED STATES

CLAUDE SMITH
Plaintiff in Certiorari

vs.

STATE OF GEORGIA
Defendant in Certiorari

**PETITION FOR CERTIORARI OF THE
COURT OF APPEALS OF THE
STATE OF GEORGIA**

**BRIEF OF LAW OF PETITIONER
REFERENCE TO OFFICIAL REPORT**

The official report of this case will be found in Volume
74 of Georgia Appeals Reports, page 777.

GROUND S OF JURISDICTION

Petitioner was indicted by the Grand Jury of the Fulton County Superior Court for the offense of keeping, maintaining and operating a lottery. This indictment after being filed in court was transferred to the Criminal Court of Fulton County for trial. The case came on for trial in the Criminal Court of Fulton County on the 3rd day of April, 1945, at which time petitioner filed a motion to disqualify and to recuse the trial Judge on the ground that he had theretofore and on the 26th day of March, 1945, illegally and unlawfully procured the release of a prospective witness, Eddie Lee Seals, who had previously been convicted on October 24, 1944, and sentenced to serve twelve months in the chaingang of Georgia, on the condition that the said Eddie Lee Seals would testify against petitioner. It was contended by petitioner that a trial before such a judge would be coram non judice because petitioner would be denied a fair and impartial trial before a fair and impartial judge. Petitioner contends that the compelling of him to stand trial before a judge who had theretofore, and before the trial of petitioner in his court, illegally and unlawfully released the prospective witness from the chaingang of Georgia in consideration of his testifying against petitioner denied to petitioner due process of law under the 14th Amendment to the Constitution of the United States.

Petitioner shows that as a basis for this court's jurisdiction that the question as to whether or not defendant is not denied due process of law when tried before a judge whose conduct as shown by the undisputed record on the

case is so reprehensible as to shock the conscience of an enlightened reviewing court Petitioner shows that this motion to recuse and disqualify the trial Judge was presented before arraignment and before pleading to the said indictment and that it was overruled and denied by the trial court and thereafter was overruled on successive appeals by the Superior Court of Fulton County, Georgia, the Court of Appeals of Georgia and the Supreme Court of Georgia, although Associate Justice Head, former Attorney General of Georgia, and Associate Atkinson, former Solicitor General of Georgia, dissented from the petition denying certiorari.

The important question here involved is does the 14th Amendment protect a defendant from trial before a judge who has stepped aside from his judicial role as a fair and impartial judge and become a prosecutor by illegally and unlawfully prostituting his office by procuring witnesses against a defendant to be tried before him, by paying for such testimony?

STATEMENT OF THE CASE

Petitioner was indicted in the Superior Court of Fulton County for violation of Georgia Code Section 26-6502 as follows:

"Any person who, by himself or another, shall keep, maintain, employ, or carry on any lottery or other scheme or device for the hazarding of any money or valuable thing, shall be guilty of a misdemeanor. (Acts 1877, p. 114.)"

After the above indictment was returned, it was transferred to the Criminal Court of Fulton County for trial whereupon the motion to recuse was filed and overruled as hereinbefore set forth.

SPECIFICATION OF ERRORS

The decision by the trial Judge in the Criminal Court of Fulton County holding and deciding that he had not disqualified himself from presiding as judge in the trial of the case of your petitioner in view of his conduct as hereinbefore set forth and the decision of the Superior Court of Fulton County, Court of Appeals of Georgia and the Supreme Court of Georgia holding and deciding that no matter how gross the prejudice and bias of a trial Judge against a defendant such trial Judge could still preside.

ARGUMENT

The trial Judge attempted to justify his purchase of a witness by saying: (Rec. p. ____).

"And it further appearing to the court that it is to the best interest of society and in line with the public policy of the State to extend immunity to witnesses who turn State's evidence."

This statement by the trial Judge is likewise false and untrue.

The Act of the Legislature of August 3, 1943 removed from the Governor the right to grant pardons and paroles and placed this power in the hands of a Pardon and

Parole Board. This also became a part of the Constitution of Georgia on that date, and we quote:

"77-511. Power of Board to grant reprieves, pardons, and paroles. Duty to supervise parolees, aid parolees and probationers, and study cases of prisoners.—The State Board of Pardons and Paroles shall have power to grant reprieves, pardons and paroles, to commute penalties, to remove disabilities imposed by law, and to remit any part of a sentence for offenses against the State, after conviction, except in cases of treason and impeachment, and except in cases in which the death sentence has been imposed and the Governor refuses to suspend the execution of such death sentence to enable the Board to consider and pass upon the same. In all cases when the Governor has suspended the execution of a death sentence to enable the Board to consider and pass on same it shall be mandatory that said Board act within a period not exceeding 90 days from the date of the suspension order of the Governor. In all cases of clemency, pardons and paroles, a majority vote of the members is sufficient for approval, except in cases involving capital punishment, and in such cases a unanimous vote of all members of the Board is necessary: Provided, however, if any member for any cause is unable to serve in any case involving capital punishment the Governor shall act as the third member of said Board and the action so taken in such instances shall be by unanimous vote. In the cases which the Board has power to consider, such Board shall be charged with the duty of determining what prisoners serving sentences in the jails and prisons and public works camps of this State may be released on pardon or parole, and affixing the time and conditions thereof. The Board shall also be charged with the duty of supervising all persons

placed on parole; of determining violations thereof and of taking action with reference thereto; of making such investigations as may be necessary and of aiding parolees or probationers in securing employment. It shall be the duty of the Board personally to study those prisoners whose cases the Board has power to consider, who may be confined in the jails, prisons and public works camps of the State, so as to determine their ultimate fitness for such relief as the Board has power to grant: Provided, however that the Board by an affirmative vote of two of its members shall have the power to commute a sentence of death to one of life imprisonment. (Acts 1943, pp. 185, 187.)"

Thus we find that the policy of the State relative to procuring testimony of convicted person by releasing them from custody rests solely with the Pardon and Parole. This constitutional board refuses to so purchase testimony, and we quote as further evidence denying and disputing the false statement of fact set forth by the trial court in his order, March 26, 1945, illegally releasing the said Eddie Lee Seals from penal servitude on December 6, 1944 (Rec. p. -----). Chairman of the Pardon and Parole Board wrote as follows:

"Dear Mr. Andrews:

The Board wishes to acknowledge and thank you for your letter of December 4th, written in behalf of the above-named prisoners. The members greatly appreciate you expressing your reasons why you recommend the release of these parties. We want you to know that the Board is in sympathy with you, the Solicitor of the City Court and all others in the undertaking to "wipe out" the lottery racket

and imprison the "higher ups" whom you say control and operate the lottery business in this section. Notice that the above-named prisoners have testified for the State in a recent lottery conviction is very encouraging and this information is being placed in the file of each of the prisoners mentioned above.

We wish to assure you and Mr. Camp that this information will be very valuable to the Board in passing on these cases when the parties become eligible for parole consideration. The Board, based on its own investigation, will be very happy to release these people, if, in our discretion, we feel that they are suitable and safe parties to return to their communities.

The Board wishes to go on record as saying that testimony in behalf of the State will be one Item in their favor in considering the cases for parole. On the other hand, we wish you to know as well as Solicitor Camp and other interested parties, that turning State's evidence is not of itself sufficient to justify this Board to grant parole when we do not feel, from their past record, that they are suitable parties to release to society.

Assuring you of our full cooperation, I am

Very truly yours,

EDWARD B. EVERETT, *Chairman*"

Be it said to the everlasting credit of the Judiciary that cases in which a similar situation is involved are very rare, so rare, in fact, that we are only able to find

one case along the line presented in the Appeal in this case and we quote from the case of Porter vs. The City of Thomasville, 16 Ga. Appeal 313.

"One charged with the violation of a municipal ordinance is, equally with those charged with greater crimes, entitled to a fair and impartial trial; and that an elleged violator of a municipal ordinance cannot obtain a fair trial (within the legal intendment of that term) before a mayor who has offered to pay fifty dollars for the conviction of the particular defendant of the particular offense with which he is charged is a proposition which does not admit of argument."

We can think of nothing more heinous than a trial Judge stepping aside from his judicial duty as was done in this case. The trial Judge judicially knew that the case against Eddie Lee Seals, No. 188774, was disposed of by him as trial Judge on October 24, 1944, and that Seals was given a twelve months sentence and that the term of court expired on the first Monday in November, 1944. Aside from the Consitution of Georgia and the Acts of Georgia on the subject of pardon and parole, the Supreme Court of Georgia in the case of Porter vs. Garmony, 148 Ga. page 261, held:

1. Where one accused of a misdemeanor was convicted, and at the term at which the trial took place was sentenced to serve a term in the chain-gang, and the accused carried the case by writ of error to the Court of Appeals, where the judgment of the lower court was affirmed, the trial court was without authority at a subsequent term, upon making the judgment of the appellate court the judgment of the trial court, to modify and change the

141 sentence formerly imposed; and where he did pass
142 an order modifying and changing the sentence, such
order was void, as the court was without jurisdiction
to alter the sentence originally imposed."

This was not a case of granting immunity to a witness in consideration of such witness testifying against another defendant. In this case the witness had been previously *convicted* and was serving his sentence.

When it is desired to grant immunity to a prospective witness, this is done, before indictment by the prosecuting attorney alone, not the judge. After conviction, it can only be done in Georgia by the *Constitutional Pardon and Parole Board*, not the trial Judge.

The trial Judge frequently may make discretionary rulings, in which event the ruling will be sustained regardless of which side prevails. Any trial Judge who has promulgated the order as shown in this case, would make every discretionary ruling against the defendant. The trial Judge likewise sat in a dual capacity, since in the event of a conviction he fixes the punishment, and while no complaint may legally be raised when the sentence fixed is within the statutory maximum, yet such a trial Judge as in this case will not and did use that benevolent discretion in fixing the sentence that is within his statutory province.

We respectfully urge the Supreme Court of the United States to grant a certiorari in this case. The records of the Supreme Court of Georgia disclose that at the time this certiorari was denied, it had granted only two cer-

tioraries in criminal cases from the Georgia Court of Appeals in over eleven years.

Respectfully submitted,

✓ Gu G. Fernald

✓ G. Seal Aiken

Attorneys for Petitioner.